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No. 80-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

W. C. YORK,
Petitioner

v.

FEDERAL HOME LOAN BANK BOARD and
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
Respondents

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF RALEIGH,
Intervenor-Respondent

**On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit**

MOTION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF

AND

BRIEF OF THE NORTH CAROLINA SAVINGS AND LOAN LEAGUE AS *AMICUS CURIAE* IN OPPOSITION

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TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The North Carolina Savings and Loan League ("League") hereby moves, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, for permission to file

the within "Brief of the North Carolina Savings and Loan League as *Amicus Curiae* in Opposition" to Petition for Certiorari and as grounds therefor alleges as follows:

I

The League is a trade organization which represents over 200 savings and loan associations in the State of North Carolina. Its membership includes state and federally chartered associations which exist in either mutual or stock form. The issue presented to this Court by the Petition for Certiorari concerns the legality of the conversion of a savings and loan association from mutual to stock form under current regulations of the Respondent Federal Savings and Loan Insurance Corporation ("FSLIC"). Many of the League's members have converted, or filed applications with the FSLIC for permission to convert, or are considering converting, to the stock form of organization, and the decision of this Court could materially affect the financial interest of such members, as described more fully in the within Brief. The League strongly believes that its members should have the freedom to choose between the mutual and the stock form of organization, and that mutual-to-stock conversions pursuant to the FSLIC's regulations do not violate the United States Constitution as Petitioner asserts.

II

The League appeared below as *amicus curiae* and filed an extensive brief in support of the FSLIC's approval of the stock conversion of Intervenor-Respondent First Federal Savings and Loan Association of Raleigh. The League believes that the decision below was correct and that no further review is warranted.

III

The League believes that its argument in support of the decision below and in opposition to the Petition for Certiorari, which includes citation and discussion of several relevant and important cases and other legal points and authorities, as well as discussion of the conversion process and the advantages of conversion, will materially assist the Court in determining whether or not to grant the Petition. Moreover, the League believes that such cases and other points of law may not be addressed in the Opposition brief filed on behalf of the respondent federal agencies or by the Intervenor-Respondent.

IV

The League has asked for the consent of all parties to the filing of an *amicus curiae* brief. While counsel for the federal agency Respondents and counsel for the Intervenor-Respondent have given their written consent, counsel for Petitioner has refused to give his consent except upon conditions.

V

Wherefore, the League prays that the within *amicus curiae* brief be filed.

Respectfully submitted,

ROBERT L. FREEDMAN
DANIEL J. GOLDBERG
ROLAND L. MARCOTTE, JR.
SILVER, FREEDMAN, HOUSLEY, TAFF & GOLDBERG

Dated: November 14, 1980 By .....

Robert L. Freedman
(Attorney of Record)
Attorneys for the North Carolina Savings and Loan League

Question Presented for Review

Do conversions of savings and loan associations from mutual to stock form under the sale-of-stock regulations of the Federal Savings and Loan Insurance Corporation deprive the members of the converting association of their proprietary interest therein in a manner contrary to law?

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BRIEF OF THE NORTH CAROLINA SAVINGS AND LOAN LEAGUE AS *AMICUS CURIAE* IN OPPOSITION

Statement of the Case

Petitioner W. C. York., a depositor at Intervenor-Respondent First Federal Savings and Loan Association of Raleigh ("First Federal") invoked the original jurisdiction of the court below, pursuant to Section 402(j)(4) of the National

Housing Act ("NHA"), 12 U.S.C. §1725(j)(4), to review the order of the Federal Home Loan Bank Board ("FHLBB"), as operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC"), approving First Federal's application to convert from a federal mutual to a federal stock savings and loan association (savings and loan associations will sometimes hereinafter be referred to as "S&Ls").

The FHLBB approved First Federal's conversion under FSLIC regulations currently in effect and set forth at 12 C.F.R. Part 563b. These regulations permit conversions by FSLIC-insured institutions, both state and federally chartered, only on a sale-of-stock basis, wherein stock is first offered to members of the mutual S&L (the depositors and borrowers), as of specified record dates in a subscription offering, with any remaining stock thereafter offered to the general public at a predetermined and uniform price per share, based upon the *pro forma* market value of the converting institution. First Federal's conversion was overwhelmingly approved by its members at a Special Meeting held to consider its Plan of Conversion and was completed through the issuance of its conversion stock on September 6, 1979. In the court below, Petitioner challenged First Federal's conversion on both statutory authority and constitutional grounds. However, in the Petition for a Writ of Certiorari, Petitioner has limited the issue for which he seeks review to the question of whether this conversion, and other conversions under the FSLIC's regulatory framework, deprive the depositors in a converting mutual institution of their proprietary interests without just compensation. The United States Court of Appeals for the Fourth Circuit has ruled that none of Petitioner's claims have merit. *York v. Federal Home Loan Bank Board*, 624 F.2d 495 (4th Cir. 1980).

Interest of the North Carolina Savings and Loan League

The North Carolina Savings and Loan League ("League"), which appeared below as *amicus curiae*, is a trade organization chartered by the State of North Carolina and represents over 200 operating S&Ls in North Carolina. Its

membership consists of federally and state-chartered S&Ls, both mutual and stock in form. Among the League's members are S&Ls which have applications pending for permission to convert, or which are considering a mutual-to-stock conversion. The League's membership also includes S&Ls which intend to retain their present mutual form of organization.

While the League does not advocate the stock over the mutual form for its members, it strongly believes that all League members should be able to choose between these alternatives. Denial of the stock conversion alternative, such as Petitioner seeks in this action, is the denial of the right of S&Ls wishing to convert to expand their lending operations and customer services through the proceeds from the sale of conversion stock. Conversion for at least some of the League's members may be their only viable option in the future to compete for financial services with commercial banks, all of which are stock institutions, and with other financial entities, particularly as rate controls on savings accounts are lifted and the cost of money of savings and loan associations continues to increase.[1]

As of October 24, 1980, 34 S&Ls based in North Carolina have applied to the FSLIC for permission to convert to the stock form; of this number, 12 applications have been approved by the FSLIC, and 4 have been completed, raising net capital of $22.3 million for these four institutions. The conversion alternative has become especially significant for state-chartered League members in recent months since the North Carolina General Assembly enacted Chapter 798 of its 1979 Session Laws, North Carolina Gen. Stat. §354A-13 (effective January 1, 1980), which allows conversion on a sale-of-stock basis, provided the Plan of Conversion has been approved by the

[1] Title II of Public Law 96-221, 94 Stat. 132, 12 U.S.C. §3501, *et. seq.* (March 31, 1980), provides for the elimination of federal controls on interests rates which depository institutions may pay for savings deposits on April 1, 1986.

North Carolina Savings and Loan Commission ("Commission"). The Commission has adopted stock conversion regulations which are virtually identical to the FSLIC regulations under attack in this proceeding.[2]

Summary of Argument

The League, believes that the Fourth Circuit's decision is correct and that no further review is warranted. The decision below, with regard to whether mutual-to-stock conversions under the FSLIC's sale-of-stock regulations are accomplished in accordance with due process requirements and adequately recognize the limited proprietary interest of depositors in a converting mutual association, is consistent with the views of the only other court of appeals which has considered stock conversions, *Harr* v. *Federal Home Loan Bank Board,* 557 F.2d 747 (10th Cir. 1977), is consistent with the views of the Internal Revenue Service as espoused in Revenue Ruling 80-105 (April 21, 1980) (which concludes that such conversions are tax-fee reorganizations), and is consistent with the will of Congress and most state legislatures which have mandated savings and loan conversions on the sale-of-stock basis.[3] Moreover, the decision below, which applies only to stock conversions by savings and loan associations, has no bearing on the rights of members of

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[2] Other states which have adopted sale-of-stock conversion laws patterned on the sale-of-stock framework of the FSLIC include Oklahoma, Okla. Stat. Tit. 18 § 381.50 (Supp. 1979), as amended by 1979 Okla. Sess. Laws, Sec. 1, Chap. 103 (H.R. 1737); Louisiana, La. Rev. Stat. §§6:950—6:950-1 (H.R. 1409, Reg. Sess., 1980); Maryland, Md. Financial Institutions Code Ann. §§9-601 to 9-612 (H.R. 1008, 1980); Connecticut, Conn. Gen. Stat. §36-1931; and Michigan, Mich. Comp. Laws Ann. §489.911

[3] As of June, 1974, a total of 22 states authorized mutual-to-stock conversions for S&Ls. S. Rep. No. 93-902, 93d Cong., 2d Sess. 3 (June 4, 1974). Since then, at least 5 additional states authorized sale-of-stock S&L mutual-to-stock conversions. See note 2 above.

other types of mutual institutions, such as credit unions, mutual life insurance companies and farmer cooperatives, and is fully consonant with the views of this Court on the limited property rights of mutual savings and loan members as expressed in *Society for Savings* v. *Bowers*, 349 U.S. 143 (1955).

ARGUMENT

A. The Advantages of Mutual to Stock Conversions

The legality of mutual-to-stock conversions must be judged, of course, based upon constitutional requirements, governing statutes, legislative history and relevant case law. In order to place the foregoing in proper perspective, however, the League will briefly explain why conversions by the sale-of-stock method are in the public interest.

Mutual-to-stock conversions of S&Ls have conferred, and will continue to confer, the following benefits:

- Conversions have markedly increased lending, savings growth and branching activity by converted institutions;
- Conversions have had a significant beneficial effect on the capital positions of converting S&Ls the majority of which had or would have had regulatory capital difficulties within five years or less in the absence of conversion;
- The capital adequacy problem has become particularly acute for the thrift industry because income on investments at most S&Ls has not kept pace with their skyrocketing cost of funds;
- The cost of funds is expected to continue to increase in the 1980's as federal rate controls are lifted and competition among all types of financial institutions increases under the general deregulation called for by Title II

of Public Law 96-221 (the "Depository Institutions Deregulation and Monetary Control Act of 1980"); and

- Conversions may increase S&Ls' profitability and speed their capital formation through bolstered earnings.

Problems with net worth and reserve requirements are often the major factor in an institution's decision to convert. Federal statutory law[4] and regulation[5] require that all FSLIC-insured institutions build up reserves to absorb losses, such reserves being calculated as a percentage of the institution's savings deposits. In addition, there are also minimum net worth requirements above the reserve requirement. These reserve and net worth requirements pose a particularly serious problem for mutual S&Ls since generally they must rely entirely upon earnings to meet regulatory reserve and net worth levels, and earnings, particularly in times of high inflation and high interest rates, simply cannot keep pace with increasing reserve and net worth requirements as savings at the institution grow. If earnings are not sufficient to meet reserve and net worth requirements, an S&L may be forced to curtail or eliminate savings growth.

Conversions are an effective means of remedying reserve and net worth deficiencies since the conversion proceeds immediately increase net worth, permitting a greater savings base while complying with reserve and net worth requirements. In addition, over a period of time, the earnings from the stock sale proceeds are added to the converted association's net worth, thus supporting further savings growth. The end result is that conversions support and increase the supply of lendable funds which can be used by converted associations for home loans, thus benefiting the Nation's housing industry.

Interest in mutual-to-stock conversions extends well beyond North Carolina. The FHLBB since 1975 has approved

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[4] Section 403(b) of the NHA, 12 U.S.C. §1726(b).

[5] 12 C.F.R. §563.13.

90 conversions, 59 of which have been completed following the issuance of nearly $300 million in conversion stock. This stock is held by thousands of stockholders throughout the nation, and some converted S&Ls have their stock listed on the New York Stock Exchange. Over 100 conversion applications are currently on file at the FHLBB, and a substantial number of S&Ls are preparing to file conversion applications. Many of the applicant and proposed applicant institutions are faced with very serious earnings and capital adequacy problems which should be remedied, at least in part, by their reorganization into the stock form.

B. Conversions under the Sale-of-Stock Method do not Deprive Depositors of their Proprietary Interests without Just Compensation

The FSLIC's existing conversion regulations, under which First Federal accomplished its conversion, are the culmination of a lengthy process involving the FHLBB, the United States Congress, the regulated industry, and the general public on the most equitable method to reorganize a mutual S&L to stock form. Although the FHLBB initially explored conversions wherein stock would be distributed without charge to an institution's members, the "free stock" type of conversion was ultimately rejected in regulations issued by the FHLBB in 1974 because studies of this approach indicated an inherent unfairness in distributing stock to persons who became depositors in anticipation of conversion, because savings shifts inherent in free stock conversions would disrupt financial markets, and because of other significant problems.[6] Congress agreed with the FHLBB that free stock distributions were unacceptable and instead sanctioned conversions by the sale-of-stock method embodied in the current regulations. Congress did, however, permit a handful of S&Ls which had applied to the FHLBB prior to adoption of its sale-of-stock regulations to convert on a

[6] *See*, 12 C.F.R. §563b.3(a).

free distribution basis. This "grandfather" provision, enacted in Public Law 93-495, appears at 12 U.S.C. §1725 (j)(2).

In the only other United States Court of Appeals decision to consider mutual-to-stock S&L conversions, the Tenth Circuit in *Harr* v. *Federal Home Loan Bank Board,* 557 F.2d 747 (1977), upheld the grandfathered "free stock" conversion of the one S&L which converted by this method. That conversion was challenged, among other grounds, on the basis that those persons who had opened savings accounts or increased the amount in their accounts after the record date approved by Congress for the free stock distribution had been deprived of their property interests without due process of law. The Tenth Circuit rejected this contention, stating that—

> . . . [a]s to the petitioners who were depositors before the closing date [i.e., the record date for stock distribution purposes], their interests were changed from that of a depositor in a mutual association to that of a stockholder in a stock association. This change was one authorized by law upon the proper vote of the depositors. These petitioners held their interests in the mutual association subject to the vote of the majority as provided by regulation. Their rights were thus at all times subject to this possibility as are the rights of shareholders generally. [*Id.* at 751]

The Tenth Circuit also noted that the free stock aspect of the conversion at issue "was contrary to any overall policy established by Congress but, as indicated, was authorized in a few specific instances." *Id.* at 750.

Petitioner argues that sale-of-stock conversions under the FSLIC's regulations (and by implication the laws of most states) violate the Fifth Amendment of the Constitution because they deprive depositors in the converting mutual S&L of their proprietary interests "without just compensation" (Petition for Certiorari, p. 5). To place this charge in proper context, a brief, general overview of the conversion process under the FSLIC's current regulations would be helpful.

The FSLIC's conversion regulations are designed to give the members of a mutual S&L the opportunity to purchase the entire stock issue through the exercise of stock subscription rights. These regulations, which, as noted above, appear at 12 C.F.R. Part 563b, apply to all FSLIC-insured, state-chartered associations, and to all federally chartered S&Ls, such as First Federal.

The process begins with the adoption by an institution's board of directors of a Plan of Conversion, which must strictly conform to required provisions in the conversion regulations. The Plan must provide that priority subscription rights to purchase the conversion stock be given to account holders as of a record date at least 90 days prior to adoption of the Plan of Conversion by the association's board of directors (a class denoted as "eligible account holders"). To the extent stock is available after eligible account holders have exercised their subscription rights, account holders and borrowers as of more recent record dates may subscribe for shares, and then members of management may be given rights to subscribe for a limited portion of the stock. Any stock left after the subscription period has ended is thereupon sold to the general public. In some cases all the stock is sold in the subscription period, and there is no need for a stock offering to the general public. The regulations require that the purchase price per share times the number of shares to be issued equal the pro forma market value of the S&L upon conversion, as determined by an independent person or firm expert in corporate appraisals.

Before a conversion can proceed, the Plan must be approved by majority vote of the association's members, following a special solicitation of proxies which includes a proxy statement disclosing all material facts about the association and the Plan of Conversion.[7] Such member vote occurs only after

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[7] As the Fourth Circuit noted, depositors in a mutual S&L, as a matter of industry-wide practice, ordinarily give management standard proxies to exercise the depositors' voting rights at the time the

(*footnote continues*)

the Plan of Conversion is reviewed for fairness by the FSLIC and is approved by that agency. In addition, the proxy solicitation material is reviewed by the FSLIC for adequacy of disclosure of material information relating to the Plan of Conversion, the financial condition and management of the converting institution, and the anticipated effects of conversion, and may not be used until the FSLIC clears it.[8] Congress has transferred from the Securities and Exchange Commission to the FHLBB enforcement of registration, reporting, and proxy solicitation requirements which apply to FSLIC-insured stock associations, including all converted associations, under the Securities Exchange Act of 1934.[9]

The depositor's proprietary interest in the net worth of a mutual S&L just prior to its conversion to the stock form is recognized under the conversion regulations by the requirement that the institution establish a "liquidation account" equal to the institution's net worth before conversion. Eligible depositors are given liquidation distribution rights in this account, pro-rated according to the percentage their individual accounts were of all savings accounts in the S&L as of the record date the institution used to determine the members of this class of depositors. These rights cannot increase but may decline in future years as these depositors close or reduce their savings accounts at the S&L. In the highly unlikely event the S&L is dissolved at some future time, and after all creditors (including depositors) are paid in full, the remaining assets of the S&L are

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(*footnote continued*)

account is opened. 624 F.2d at 497, n.1. The FSLIC's regulations prohibit the use of such proxies, however, for voting on a Plan of Conversion, and require a special solicitation of proxies to vote on such Plan.

[8] As noted, the FHLBB is the operating head of the FSLIC. Therefore, all references herein to the FSLIC also refer to the FHLBB.

[9] *See.* 15 U.S.C. §781(i).

used first to satisfy liquidation account rights in full, with any residue going to the stockholders.

It is apparent from the foregoing discussion that a mutual-to-stock conversion under the FSLIC's regulations is a process unique to the savings and loan business and does not, as Petitioner contends, have ramifications for other types of mutual institutions, such as life insurance companies, credit unions and farmer cooperatives (Petition for Certiorari, p.4)[10] Furthermore, it is clear that the Fourth Circuit properly rejected Petitioner's claim that this conversion process deprives depositors of their proprietary interests in violation of the Fifth Amendment.

The Fourth Circuit did not, as Petitioner contends, hold that members of a mutual S&L "have no significant rights other than those of creditors" (Petitioner for Certiorari, p. 8). Rather, the Court below recognized, as have many other courts,[11] the dual relationship of the depositor to the mutual S&L, both as "owner" of the institution, with liquidation and voting rights, and as a creditor. The creditor status of depositors has become particularly predominant at federal S&Ls since 1969, when legislation was enacted permitting federals to change from "share" type institutions (where account holders receive a return on their savings in the form of "dividends"; the dividend is invariably set at the competitive savings interest rate

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[10] In this regard, the Internal Revenue Service, in a Revenue Ruling issued on April 21, 1980, giving favorable tax treatment to stock conversions under the FSLIC's regulations, notes that "[t]he financial structure and control structure of federal regulated savings and loan associations . . . are unique among business organizations. Accordingly, the law and analysis as applied to these conversions is peculiar to such associations." Rev. Rul. 80-105, Internal Revenue Bull. No. 1980-16, page 5, April 21, 1980.

[11] *See, e.g., Mengele* v. *Christiana Federal Savings & Loan Association*, 287 A.2d 395 (Del. 1972), *Family Savings and Loan Association Shareholders' Protective Committee* v. *Stewart*, 215 A.2d 726, 728 (Md. 1966).

prevailing in the S&L business but a share S&L cannot pay any dividends unless it first meets all FSLIC reserve and net worth requirements)[12] to "deposit" type institutions (where account holders are paid for the use of their funds according to a fixed, contractual interest rate, irrespective of the S&L's earnings). *See,* 12 U.S.C. §1464(b)(1). Similar legislation has been adopted by most states. Since 1969, most S&Ls, including all converting associations, have been deposit institutions.[13] As the Fourth Circuit noted in the decision below, depositors in an FSLIC-insured association "do not share in the risk of loss since their deposits are federally insured, and their only opportunity to realize a gain of any kind would be in the event the savings and loan association dissolved or liquidated." 624 F.2d at 500.

Any inchoate right which depositors in a mutual S&L may have to any surplus resulting from the speculative and remote possibility of a voluntary liquidation of the institution clearly does not constitute a "property right" warranting compensation upon conversion. This Court, in *Society for Savings* v. *Bowers,* 349 U.S. 143,150 (1955), held that this "property right" does not rise to the level of an expectancy, and any theoretical value

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[12] Distributions to account holders in a share-type institution have not been treated by the Internal Revenue Service as "dividends" in the usual corporate sense. As the Supreme Court of Illinois noted in *Lanigan* v. *Apollo Savings,* 288 N.E. 2d 445, 450 (1972): "Federal tax provisions . . . require that dividends payable to withdrawable capital account holders are treated in the same manner as interest paid by banks. These payments are deductible in computing the association's taxable income. (Int. Rev. Code of 1954, sec. 591.) Correspondingly, the dividends received by an account holder are treated as ordinary interest income and are not eligible for a dividend exclusion. Int. Rev. Code of 1954, sec. 116(c)."

[13] In our inflationary economy with widely fluctuating interest rates, savers prefer the assurance of receiving the fixed, contractual interest rate offered by deposit S&Ls. The "share" S&L is rapidly becoming extinct.

which a depositor may have in such right reduces almost to the vanishing point.[14]

The deprivation of a mere hope or expectancy does not violate any constitutionally cognizable right of depositors in a mutual S&L and therefore does not require that compensation be paid to these depositors, as Petitioner claims. See *F.H.A.* v. *Darlington, Inc.*, 358 U.S. 84, 91 (1958); *Rocker* v. *Cardinal Building & Loan Ass'n*, 179 A. 667, 671 (Sup. Ct. N.J. 1935), *aff'd*, 194 A. 865 (N.J. 1937), upholding a New Jersey law which changed the withdrawal rights of present and future S&L account holders in State-chartered institutions; *Bucsi* v. *Longworth Building & Loan Association*, 194 A. 857, 863 (N.J. 1937), and *Family Savings and Loan Association Shareholders' Protective Committee* v. *Stewart*, 194 A.2d 118, 121 (Md. 1963).[15]

It is also significant that the Internal Revenue Service has concluded that "[s]ince the equity interest of a depositor in a mutual savings and loan association is more nominal than real, unlike that of a shareholder in a corporation, the conversion [under the FSLIC's regulations] into a ... stock savings and loan association is a mere change in identity, form, or place or organization within the meaning of section 368 (a) (1) (F) [of the Internal Revenue Code]" and thus a tax-free reorganization. *See*, Rev. Rul 80-105, Internal Revenue Bull. No. 1980-16, page 5, April 21, 1980.

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[14] The above observation in *Bowers* is of even greater force with respect to the conversion of First Federal and other deposit-type S&Ls, since *Bowers* dealt with the proprietary interests of account holders in a share-type institution.

[15] In the *Family Savings* case, the issue was whether Christmas Club account holders in a dissolved mutual S&L should be treated as creditors or shareholders (the court concluded they were creditors). In so holding, the Maryland Court of Appeals noted the shareholder-creditor duality of a mutual account holder and found that their rights "may be enlarged or restricted by special legislation, the Statute under which the corporation is incorporated, its charter or its by-laws." 194 A.2d at 121.

Endeavoring to make this case more attractive for *certiorari*, Petitioner suggests that the rationale of *Bowers* will cease to exist on March 31, 1986, when federal rate control authority—which limits the maximum interest rates payable by depository institutions—expires under the provisions of Title II of Public Law 96-221, and federal mutual S&Ls, according to Petitioner, then will be able to pay above-market rates of return to depositors (Petition for Certiorari, pp. 14-15).

Petitioner's argument is misplaced. First Federal's conversion was approved by the FHLBB on May 17, 1979, and its Plan of Conversion was approved by First Federal's members on June 29, 1979 (624 F. 2d at 497). Both events took place well before the enactment of Public Law 96-221 on March 31, 1980. Moreover, there simply is no basis for Petitioner to speculate that federal mutual S&Ls will be able to pay depositors above-market rates of interest or dividends six years from now when rate control authority expires, and that such future ability places a material value on depositors' present proprietary interest in the net worth of the federal mutual S&L. After March 31, 1986, depositors, as they do now, will seek the highest available fixed, contractual rate of return on their savings. And since federal mutual S&Ls must compete with stock S&Ls, commercial banks (which are all stock in form), credit unions, saving banks and other financial entities for savings deposits, it is entirely reasonable to anticipate that the market place—not the form of organization—will determine the rate of interest payable by financial intermediaries. Thus, if a mutual S&L were to pay above-market interest rates solely in order to return its surplus to depositors (including *new* depositors seeking the higher rates), it would not remain in business very long. Indeed, assuming, *arguendo*, future above-market rates are to be paid at all, such rates will be available only from a few S&Ls with a superior net worth and the need for greatly expanded savings flows to support unusually profitable lending. And assuming such circumstances may exist in the future, it is

the converted S&L—not the under-capitalized mutual—which likely will fall into this very limited and narrow category.[16]

Finally, the FSLIC's conversion regulations specifically require that the plan of conversion be approved by a vote of at least a majority of the total outstanding votes of the members of the converting S&L, 12 C.F.R. §563b.6(d) (and in conversions to date, or the average, over 95 percent of members voting on the Plans of Conversion voted to approve the Plans). As noted above, the law is clear that members hold "their interests in the [converting] mutual association subject to the vote of the majority as provided by regulation", and that "their rights were thus at all times subject to this possibility [of conversion] . . . ." *Harr* v. *Federal Home Loan Bank Board, supra,* 557 F. 2d at 751. It is especially significant that in the conversion at issue in *Harr,* only account holders as of July 13, 1972, were entitled to

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[16] Attempting to broaden the issue presented for review, Petitioner contends that when federal interest rate control authority expires in 1986, the sole justification for the retention of earnings by a federal mutual S&L would be to establish reserves for losses of the institution, and any surplus in excess of reserves should be paid to the depositors (Petition for Certiorari, p. 15). It is true that federal mutual S&Ls, like all FSLIC-insured institutions, are required under Section 403(b) of the NHA, 12 U.S.C. §1726(b), to establish reserves for the purpose of meeting losses. This requirement is the subject of a FHLBB regulation, 12 C.F.R. §563.13 as recently amended (45 Fed. Reg. 50718, July 31, 1980). In addition, the FHLBB also requires all FSLIC-insured institutions, including federal mutuals, to meet certain net worth requirements, which in most instances are significantly higher than the statutory reserve provided for in the NHA. See, 12 C.F.R. §563.13. Therefore, not only must earnings be retained as reserves against losses, but federal mutual S&Ls also must utilize earnings to meet the additional FHLBB net worth requirements. Furthermore, as noted above, FSLIC-insured S&Ls are unable to materially grow in terms of both asset and deposit size unless they have net worth and reserve accounts significantly in excess of those required by the FHLBB. Therefore, S&Ls, including federal mutuals, ordinarily utilize major portions of their earnings to "build up" these accounts to support future growth.

receive conversion stock under the association's grandfathered "free stock" conversion plan, even though the conversion was not consummated until April 15, 1976. Persons who opened new accounts, or increased their accounts, between these dates, got no conversion stock based on such new or increased accounts, nor was any type of "liquidation account" set up for them, nor did they receive any monetary compenstation. The Tenth Circuit rejected the contention of the petitioner in the *Harr* case that this made the plan of conversion illegal, and upheld the FHLBB's approval of the plan.

Therefore, the League submits that conversions do not destroy any meaningful property rights of depositors of converting S&Ls, and that a converting S&L is not required by law to compensate them upon reorganization as a stock S&L.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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